STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

City of Dover et. al.

v.

David Scanlan, Secretary of State for New Hampshire et. al.

Docket No. 219-2022-CV-00224

PLAINTIFFS' OBJECTION TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs, City of Dover, New Hampshire ("Dover"), City of Rochester, New Hampshire ("Rochester"), Debra Hackett, Rod Watkins, Kermit Williams, Eileen Ehlers, Janice Kelble, Erik Johnson, Deborah Sugerman, Susan Rice, Douglas Bogen, and John Wallace, by and through their undersigned counsel, and object to the Defendants' Joint Motion for Summary Judgment, stating in support as follows:

Introduction

Plaintiffs agree there are no material facts in dispute. However, the State and its Secretary of State (hereinafter "Defendants") have now laid bare a view of Part II, Article 11 that lacks merit or supporting authority: their view being that if compliance with an express constitutional requirement is impossible in some instances, no compliance is required in any instance. Laws 2022, ch. 9 unconstitutionally deprived the Affected Towns/Wards (as defined in the Plaintiffs' summary judgment motion/memorandum) of a dedicated House district/seat. There is no justification, much less a constitutional one, for these deprivations. As set forth

below and in Plaintiffs' related summary judgment filings,[1] Defendants' request for summary judgment should be denied.

Plaintiffs' Response to Defendants' Statement of Material Facts

As stated in the Plaintiffs' accompanying responses to each fact paragraph responding to the Defendants' statements of material facts, which responses are incorporated herein by reference, Plaintiffs dispute none of the facts set forth in the Defendants' summary judgment motion, but Plaintiffs do dispute the materiality of Defendants' reliance upon the facts related to the Town of Durham's population. Durham's population as compared to other towns in Strafford County is simply irrelevant, as nothing in Part II, Article 11 prioritizes any qualified town or ward over another qualified town or ward based on anything Defendants cite. Nor does HB 50's legislative history contain any such discussion. *See Opinion of the Justices*, 87 N.H. 496, 497 (1935) ("The constitutionality of a statute is to be decided by an examination of its real purpose and actual effect."); *State v. Paille*, 90 N.H. 347, 356-57 (1939) (observing same).

Argument

I. Defendants bear the burden of constitutionally justifying Laws 2022, ch. 9's avoidable deficiencies.

Though largely academic, the Defendants incorrectly argue the burden of proof is currently on the Plaintiffs. The State has expressly admitted that the population deviation of Laws 2022, ch. 9 exceeds the 10% threshold at which a plan becomes presumptively unconstitutional. The State has also effectively admitted that Map-a-Thon correctly determined a way to avoid depriving 14 dedicated House districts to qualified towns/wards while reducing

[1] Plaintiffs hereby incorporate by reference in full plaintiffs' summary judgment motion, supporting memorandum of law, supporting exhibits (and statement of facts), and any forthcoming summary judgment reply memorandum Plaintiffs may file. In order to streamline the Court's analysis, plaintiffs have refrained from restating any more of their summary judgment analysis herein than is necessary.

population deviation to a presumptively constitutional level. Once a person challenging an enacted plan shows that such constitutional deficiencies could have been avoided, the State then bears the burden of justifying why it nonetheless enacted the chosen plan. *See City of Manchester v. Secretary of State*, 163 N.H. 689, 701 (2012). Regardless of whoever bears the burden of proof, the operative legal question remains steadfastly the same: Is there any "rational or legitimate" basis for the redistricting plan's unconstitutional exceedances?

II. Defendants' standing argument lacks merit.

Defendants do not dispute that Plaintiffs have standing to bring claims relating to their own wards and towns. But, Defendants claim, "the Plaintiffs lack standing to assert alleged violations to the constitutional rights of the Towns of Chesterfield, Hinsdale, Canaan, Hanover, Bow, Plaistow, and Milton" (hereinafter the "Non-Party-Towns") because no plaintiff lives in the Non-Party Towns. *See* Defs' MSJ ¶ 36. This assertion confuses standing with the scope of the Court's remedial authority.

To first dispel Defendants' cited case law, Defendants cite *Duncan v. State*, 166 N.H. 630 (2014) and *Teeboom v City of Nashua*, 172 N.H. 301 (2019). Yet these cases concerned the distinguishable non-issue (in this case) of taxpayer standing.[2] Here, it is undisputed that Plaintiffs have suffered an alleged injury sufficient to confer standing to assert their claims, at least with respect to their own towns and wards. It does not follow, however, that if Plaintiffs establish that Laws 2022, ch. 9 violates the State Constitution, then this Court is powerless to remedy that violation for all the Affected Towns/Wards.[3]

[2] Taxpayer standing now, by amendment to the State Constitution amendment, is implicated only in challenges to governmental spending decisions. This case alleges injuries to voters and political subdivisions.

[3] To clarify, this defined term should be updated slightly to also include the Town of Newton, in Rockingham County. *See* Ex. G to Andrews Aff.

Measuring the constitutionality of Laws 2022, ch. 9 inherently involves disputed propositions of constitutional law equally applicable across the state. *See Twin Falls County v. Idaho Comm'n on Redistricting*, 271 P.3d 1202, 1205 (Idaho 2012) ("The extent to which counties (plural) must be divided to comply with the Federal Constitution can be determined only by counting the total number of counties divided under the plan."); *Town of Brookline v. Sec'y of Com.*, 417 Mass. 406, 417–18 (1994) ("The number of town, city, and county boundaries crossed by representative districts in c. 273 is evidence that can be considered for purposes of determining whether the legislation sufficiently complies with the territorial directive of art. 101."); *City of Manchester v. Secretary of State*, 163 N.H. 689, 701 (2012) (using statewide "overall range of deviation for the Plan [of] 9.9%" for analysis of intertwined issues, analyzing constitutionality under Part II, Article 11, and focusing primarily on addressing plaintiffs' proposed House plan with "an overall deviation of 14% . . . which also gives twenty-four additional towns, wards, and places their own representatives"). Because Defendants have identified no relevant differences between Non-Party Towns and the Affected Towns/Wards, the analysis of Part II, Article 11 as to Laws 2022, ch. 9 applies with equal force statewide.

Here, the operative districting legislation itself (Laws 2022, ch. 9) is a statewide plan that contains no severability clause.[4] If depriving Plaintiffs of their own representatives is unconstitutional, then depriving the Non-Party Towns of their own representatives is necessary unconstitutional as well—they are identically situated. The question, then, is not whether Plaintiffs have standing to assert their claims (they undisputedly do), but whether a remedy for the constitutional violation can extend to the Non-Party Towns. In making their "standing" argument, Defendants have identified no relevant differences between Non-Party Towns and the

[4]However, as plaintiffs stated in their opening summary judgment memorandum, the "least change" judicial remedy in this case can likely "kill two birds with one stone" and confine changes to the Affected Towns/Wards.

other Affected Towns/Wards, meaning the Court's analysis and disposition of pure legal issues concerning of Part II, Article 11 would be precedent applicable to the entire state.

Not only *can* a remedy extend to the Non-Party Towns—it *must*. Courts "*must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 424 (M.D.N.C. 2018) (citing cases), *aff'd in relevant part*, 138 S. Ct. 2548 (2018); *see also Norelli v. Sec'y of State*, 175 N.H. 186, 200 (2022) ("It is the duty of the judiciary to protect constitutional rights and, in doing so, to support the fundamentals on which the Constitution itself rests."); *GRACE, Inc. v. City of Miami*, ___ F. Supp. 3d. ___, 2023 WL 4853635, at *1 (S.D. Fla. July 30, 2023) (rejecting remedial plan that did not "completely correct the constitutional defects the Court found were substantially likely to exist in the Enjoined Plan"); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016) ("But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case."); *Harper v. City of Chicago Heights*, 223 F.3d 593, 599–600 (7th Cir. 2000) ("[I]f the jurisdiction fails to remedy completely the violation or if a proposed remedial plan itself constitutes a [Voting Rights Act] violation, the court must itself take measures to remedy the violation.") (citation omitted); *Williams v. City of Texarkana*, 32 F.3d 1265, 1268 (8th Cir. 1994) ("If an appropriate legislative body offers a remedial plan, the court must defer to the proposed plan unless the plan does not completely remedy the violation ….").

Cases remedying malapportionment show there is no merit to Defendants' contention that the Court cannot remedy a constitutional violation in a town where no Plaintiff lives. Often, a plaintiff challenges a districting plan on the grounds that it violates the constitutional

requirement of "one person, one vote." If the Defendants' views were correct, then a successful plaintiff would be entitled to nothing more than a plan in which that plaintiff's district is acceptably close to the ideal population; other districts could not be altered except to the extent necessary to fix the plaintiff's district. This is not how malapportionment cases are resolved; courts ensure that all districts have similar populations—as they must, given their obligation to completely remedy a constitutional violation. For example, after the 2000 census, the New Hampshire Legislature failed to enact new House and Senate districts, which resulted in widespread violations of the "one person, one vote" requirement. *See Below v. Gardner*, 148 N.H. 1 (2002); *Burling v. Chandler*, 148 N.H. 143 (2002). Eleven individuals petitioned the New Hampshire Supreme Court to declare the Senate districts unconstitutional and to draw new ones, and another eleven individuals did the same for the House districts. *See Below*, 148 N.H. at 4; *Burling*, 148 N.H. at 145. The Court ruled in their favor, but it did not redraw just the House and Senate districts where the petitioners lived; it corrected population deviations statewide. *See Below*, 148 N.H. at 13–14; *Burling*, 148 N.H. at 157–59. This is the correct approach; a court must not approve or draw a districting plan with aspects it has found to be unconstitutional. *See Brown v. Jacobsen*, ___ F.R.D. ___, 2022 WL 122777 (D. Mont. Jan. 13, 2022) (invalidating five malapportioned districts when plaintiffs lived in just two of those districts); *Adamson v. Clayton County Elections & Registration Bd.*, 876 F. Supp. 2d 1347 (N.D. Ga. 2012) (redrawing nine districts in a case involving six plaintiffs).

In any event, the Plaintiffs in this matter have proposed that the Court allow the Legislature a time-limited opportunity to fix the existing House districts, so debate over any specific town or ward is premature. If this Court holds that unnecessarily depriving towns and wards of dedicated representatives is unconstitutional, the Legislature may well choose to

provide dedicated representatives to the Non-Party Towns as well. Only after the Legislature acts (or fails to act) would the Court need to confront the scope of any judicial remedy. From strictly a judicial economy point of view, were the Plaintiffs to succeed on summary judgment and receive a remedy excluding consideration of the Non-Party Towns, undoubtedly voters from those towns would seek to intervene or file a new case to challenge the remedial House plan, kicking off a new round of litigation. This piecemeal process can be readily avoided.

III. Laws 2022, ch. 9 (House Bill 50) does not comply with all constitutional criteria.

In paragraphs 40 through 45, Defendants argue the enacted House plan within Laws 2022, ch. 9 "complies with all redistricting requirements." As set forth in the Plaintiffs' summary judgment motion, the undisputed facts establish as a matter of law that not only did the enacted House plan exceed the 10% population deviation threshold,[5] but more fundamentally failed to follow Part II, Article 11's express requirement and the resulting clear hierarchy of House redistricting criteria. In short, the enacted House plan unconstitutionally prioritized non-constitutional criteria over the dedication requirement in Part II, Article 11, and did so unnecessarily and without any rational or legitimate basis. Indeed, even now the Defendants argue in their current motion that non-constitutional criteria should override a constitutional mandate (Part II, Article 11), in arguing that the population of Durham somehow warrants sacrificing at least two dedicated House districts (for Lee and Dover Ward 4), *see* Ex. B. to Ex. 1 to Plfs' Mem. of Law in support of summary judgment (explaining on page 2 Map-a-Thon's map has net gain of 14 and only Durham would lose its dedicated House seat).

[5] While the plaintiffs have not asserted a stand-alone cause of action based on population deviation, the defendants do not dispute that Laws 2022, ch. 9 exceeds 10% deviation, or that such deviation is presumptively unconstitutional. So it is inaccurate to say the enacted plan "complies with all redistricting requirements."

IV. Laws 2022, ch. 9 lacks any rational or legitimate basis for the degree of Part II, Article 11 violations.

Burying the lede, Defendants confront the core substantive issue in this case—whether there was a "rational or legitimate basis" for the degree of Part II, Article 11 violations in the enacted House plan—in four paragraphs in the penultimate section of their summary judgment motion, *see* Defs' MSJ ¶¶ 49-52. Defendants' brevity on this subject speaks for itself. In sifting through Defendants' four paragraphs, the Court will not find any legal justification for rejecting the Map-a-Thon plan and depriving the Affected Towns/Wards of their dedicated House seat.

Defendants claim, incorrectly, that the State Constitution "is silent regarding how the Legislature must decide which towns, ward, and places should receive" a dedicated House district/seat when it is impossible to "provide every single town with a single-member district." *See* Defs' MSJ ¶ 49. As explained in Plaintiffs' summary judgment memorandum, there is a well-established "hierarchy of applicable law" controlling House redistricting, *City of Manchester*, 163 N.H. at 703; *see also Johnson v. Curry (In re Title, Ballot Title)*, 374 P.3d 460 (Colo. 2016) (discussing constitutional "hierarchy of criteria", including restriction on "unnecessary division of counties"). That hierarchy is hardly "silent"—the hierarchy mandates that, first, federal requirements be met, followed next by the State Constitution's requirements, and "nonconstitutional considerations . . . may be considered **only after all constitutional criteria** have been met." *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 111 (Colo. 2011) (emphasis added); *Idaho Comm'n*, 271 P.3d at 1204; *Durst v. Idaho Comm'n for Reapportionment*, 505 P.3d 324, 330 (Idaho), *cert. denied sub nom*, 143 S. Ct. 208 (2022) ("First, the hierarchy of applicable law governing redistricting provides that the Equal Protection Clause of the Federal Constitution is the paramount authority. Second, Idaho's Constitution prohibits the division of counties, except to meet the constitutional standards of equal

protection."); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992), *aff'd sub nom.*, 507 U.S. 981 (1993) ("There is a strict hierarchy among these criteria.").

Relying heavily on *City of Manchester*, Defendants attempt to portray this dispute as one over which plan, the Map-a-Thon plan or the enacted House plan, is "better." Defs' MSJ ¶ 47 (quoting *City of Manchester*, 163 N.H. at 698). However, this dispute is about whether the State can violate the New Hampshire Constitution more than a dozen times without citing any provision of the United States Constitution, a federal statute, or the New Hampshire Constitution that might serve as a possible justification. *City of Manchester* was completely different than this case because the enacted plan's deviation in *City of Manchester* was presumptively constitutional (its population deviation was below 10%), and the plaintiffs' allegedly "better" plan would have raised the deviation to a presumptively unconstitutional level. *See City of Manchester*, 163 N.H. at 703–04. Here, the situation is reversed; the deviation of the Map-a-Thon House plan is presumptively constitutional, and the enacted House plan's deviation is presumptively unconstitutional.

Whatever discretion the Legislature has in a situation where it must balance constitutional requirements against each other (as in *City of Manchester*, where complying with the equal population requirement resulted in more violations of Part II, Article 11), this case presents no such question. As already discussed in the Plaintiffs' summary judgment memorandum, the Legislature could easily have eliminated a net of 14 Part II, Article 11 violations—a 25% reduction from the total violations in the enacted House Plan (with the practical of effect of providing over 70,000 voters a dedicated House seat), and it could have done so without reducing compliance with any other constitutional provision or statute.

True, Map-a-Thon's proposed House plan (as compared to the enacted House plan) would mean Durham would lose its dedicated House seat in the enacted plan. Still, this asserted justification falters right out of the gate because Map-a-Thon's plan improves on the enacted House plan by reducing the total six Strafford County Part II, Article 11 violations in the enacted House plan to only two total in the Map-a-Thon plan, a two-thirds reduction for Strafford County alone. Undeterred, Defendants nonetheless assert that giving a seat to Durham (population 15,490) can justify taking one away from five other towns or wards (total population: 29,186)[6] because Durham is "the single most populous town or ward in the entire County." Defs' MSJ ¶ 50. Putting aside the arguably misleading wording of that assertion,[7] together with the lack of regard for the much larger population of the five other towns and wards and the absence of any legislative history indicating in any way this was the actual motivation of the Legislature in devising a Strafford County House plan,[8] at bottom nothing in the State Constitution enables the Legislature to prioritize non-constitutional preferences such as population size over the requirements of the State Constitution. The State/Legislature have an express constitutional duty

[6] The five towns or wards and their populations are Barrington (9,326), Dover Ward 4 (5,439), Milton (4,482), Lee (4,520), and Rochester Ward 5 (5,419). Pls' MSJ at 5–7. Similarly, the Defendants note that the enacted plan gives Campton its own seat and the Map-a-Thon plan does not. Defs' MSJ ¶ 23. Similar to Durham, taking a seat from Campton enables reduction of the number of Part II, Article 11 Article violations by allowing two other towns in Grafton County to have their own seats: Hanover and Canaan. *See* Pls' MSJ at 5–7.

[7] The defendants incorrectly characterize Durham as the "the largest town, ward, and place in the County." Defs' MSJ ¶ 50. Durham may be the largest "town" form of political subdivision in Strafford County, but it is not the largest place; the cities of Dover and Rochester each have more than twice the population of Durham.

[8] *See Opinion of the Justices*, 87 N.H. 496, 497 (1935) ("The constitutionality of a statute is to be decided by an examination of its real purpose and actual effect."); *State v. Paille*, 90 N.H. 347, 356-57 (1939) (observing same). The defendants also speculate, with no evidence, that "[t]he Legislature could also have rationally decided to prioritize giving Durham a single-member district because, unlike other municipalities in Strafford County, Durham contains a large State university." Defs' MSJ ¶ 50. Part II, Article 11 contains no exception for large State universities, and the defendants' speculation about the Legislature's intent is not evidence. Nor could the defendants' speculation ever be tested because the defendants have objected to discovery into the Legislature's intent (beyond the bill jacket itself) on the grounds of legislative privilege. *See* Ex. 4 to Plfs' Mem. of Law in Support of Summary Judgment, at 2.

to minimize Part II, Article 11 violations in Strafford County (and throughout the State).[9] Nothing in Part II, Article 11 authorizes the Legislature to prioritize a town with larger population (indeed, one might reasonably assume directly to the contrary, in that Part II, Article 11 was meant to avoid favoritism to larger New Hampshire communities).

What is more, Part II, Article 11 provides: "The apportionment shall not deny any other town or ward membership in one non-floterial representative district." Under Map-a-Thon's proposed House plan, neither Durham nor any other town or ward is placed solely in a floterial district. Part II, Article 11's express text—"any other"—plainly guides how to handle the current situation: ensure nobody's sole representation in the House is floterial alone.

Likewise, the Defendants' arguments concerning Hillsborough County similarly lack merit. Defendants characterize the Map-a-Thon improvement in that county—reduction of two Part II, Article 11 violations—as "marginal[]"[10], but lack any authority for that statement. *See Idaho Comm'n*, 271 P.3d at 1205 ("If one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties."). Defendants contend the Legislature was entitled to violate the Constitution because doing so allowed them to reduce the number of floterial districts. But, as already discussed, Part II, Article 11 authorizes the use of floterials, as long as each town or ward is in a non-floterial district as well. Nothing else in Part II, Article 11 (or any other part of the State Constitution)

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[9] *See Idaho Comm'n*, 271 P.3d at 1207 (construing Idaho Constitution; "This constitutional provision is a restriction on the commission's discretion, not a grant of discretion. The commission can certainly exercise discretion to the extent that it is not limited by the Constitution or by statute, but it does not have the discretion to exceed the limits imposed by either the Constitution or a statute."

[10] For reference, Map-A-Thon's plan enables the Towns of New Ipswich (pop. 5,204) and Wilton (pop. 3,896) to gain a dedicated House seat, which no doubt is anything but "marginal" to those towns and their residents. *See* Ex. 1 to Plfs' Mem. of Law In Support of Summary Judgment, at Ex. G (Hillsborough County discussion).

authorizes any ceiling or floor or other metric for using floterials. So the sheer number of floterials cannot constitutionally serve as any basis for prioritizing one plan over another.

V. The Court has already decided the "political question" issue (twice).

In paragraphs 46 through 48 and paragraphs 53 through 59, Defendants revisit the political question issue. The time for such arguments has passed.

Defendants have now, by way of two separate motions in this case (a motion to dismiss and a motion for reconsideration), already unsuccessfully argued that Part II, Article 11 presents only a political question. The Court correctly denied the Defendants' motion to dismiss and motion for reconsideration, rejecting the suggestion of a "political question." Plaintiffs rely on, and incorporate by reference, the Court's rulings to date, as well as Plaintiffs' earlier filings, authority, and analysis explain why not "political question" issue exists in this case.

Defendants provide no new relevant authority. The defendants' citation to *Brown v. Secretary of State*, ___ N.H. ___, 2023 N.H. LEXIS 220 (Nov. 29, 2023) does not aid defendants' argument. Plaintiff have asserted no "political gerrymandering" claim as in *Brown*.

Plaintiffs, moreover, have not simply devised a better House redistricting plan as a litigation strategy to engineer a claim. The fact is Map-a-Thon created that plan years ago and presented it to the Legislature, who either misunderstood the law and *City of Manchester* (giving the benefit of the doubt) or simply ignored Map-a-Thon's submissions. To grant judgment to Plaintiffs, this Court need only answer a straightforward, justiciable question: can the Legislature enact a law that violates an express provision of the New Hampshire Constitution more than a dozen times, when the Legislature undisputedly had been shown that these violations were unnecessary to comply with any other constitutional or statutory requirement? The answer is no.

Conclusion

For the reasons set forth above and in Plaintiffs' other summary judgment filings, the Court should deny summary judgment to the Defendants. While there are no disputes of material fact, RSA 662:5 (Laws 2022, ch. 9) has unconstitutionally drawn House districts by failing to minimize violations of Part II, Article 11 and committing 14 unnecessary violations of Part II, Article 11, unsupported by any basis, much less a "rational or legitimate" basis.

Respectfully submitted,

THE CITY OF DOVER, NEW HAMPSHIRE

Dated: January 19, 2024 By: /s/ Joshua M. Wyatt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record through the Court's electronic filing system. A Word version copy of the plaintiffs' statement of material facts is also being emailed this day directly to counsel of record for the defendants.

Dated: January 19, 2024 By: /s/ Joshua M. Wyatt

Joshua M. Wyatt, Esquire